Salchi SPA v Ler Cheng Chye (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–490 OF 1997
KAMALANATHAN RATNAM J
21 OCTOBER 1999

Civil Procedure *— Security for costs against plaintiff — Plaintiff a foreign company domiciled overseas — Whether circumstances were such to grant security for costs — Rules of the High Court 1980 O 23 r 1(1)*

The plaintiff was an Italian company, domiciled in Italy whose application for summary judgment was disallowed and leave was granted to the defendant to defend the action subject to the defendant paying RM300,000 into court (see [1999] 3 MLJ 133). The defendant then applied to obtain security for costs against the plaintiff. The senior assistant registrar dismissed the application and the defendant appealed.

Held, dismissing the appeal with costs:

Under O 23 r 1(1) of the Rules of the High Court 1980, security for costs cannot be ordered as of right from a foreign plaintiff but only if the court thinks it just to order depending on the circumstances of the case and whether the justice of the case required the granting of such security for costs (see p 558F–H); *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310 followed. In this case, the defendant had not shown that he had no other remedy based on Italian law to recover costs in Italy if the plaintiff failed in this action. Even if there was such a law available, the defendant failed to show that any delay that might be occasioned in the process of recovering its costs through such available law, would be so prejudicial as to fall within any of the circumstances that the court ought to consider in the defendant's favour (see p 559H–I); *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 and *BMI Building Material International GmbH v Roberto Building Material Pte Ltd* [1999] 2 SLR 39 followed.

[Bahasa Malaysia summary

Plaintif merupakan sebuah syarikat Itali, berdomisil di Itali di mana permohonan untuk penghakiman terus telah tidak dibenarkan dan kebenaran telah diberikan kepada defendan untuk membela tindakan tersebut tertakluk kepada defendan membayar RM300,000 kepada mahkamah (lihat [1993] 3 MLJ 133). Defendan kemudiannya telah memohon untuk memperolehi jaminan kos terhadap plaintif. Penolong kanan pendaftar telah menolak permohonan tersebut dan defendan telah merayu.

Diputuskan, menolak rayuan tersebut dengan kos:

Di bawah A 23 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980, jaminan kos tidak boleh diperintahkan sebagai hak daripada plaintif

yang berdomisil asing tetapi hanya sekiranya mahkamah berpendapat adalah adil untuk memberi perintah sebegitu bergantung kepada keadaan kes tersebut dan sama ada keadilan di dalam kes tersebut menghendaki kebenaran jaminan kos sedemikian (lihat ms 558F–H); *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310 diikut. Di dalam kes ini, defendan tidak menunjukkan bahawa beliau tiada remedi lain berdasarkan undang-undang Itali, untuk mendapat kembali kos di Itali sekiranya plaintif gagal di dalam tindakan ini. Sekira pun ada undang-undang sepertinya wujud, defendan gagal menunjukkan bahawa kelewatan yang mungkin dialami dalam proses mendapat balik kos melalui undang-undang yang wujud itu akan menjadi amat prejudis jika ia jatuh di bawah mana-mana keadaan yang mahkamah sepatutnya pertimbangkan untuk menyebelahi defendan (lihat ms 559H–I); *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 dan *BMI Building Material International GmbH v Roberto Building Material Pte Ltd* [1999] 2 SLR 39 diikut.]

Notes

For cases on security generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4058–4068.

Cases referred to

Abdul Fattah Mogawan & Anor v MMC Power Sdn Bhd & Anor [1997] 5 CLJ 1 (refd)

BMI Building Material International GmbH v Roberto Building Material Pte Ltd [1999] 2 SLR 39 (folld)

Kasturi Palm Products v Palmex Industries Sdn Bhd [1986] 2 MLJ 310 (folld)

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273 (folld)

Legislation referred to

Reciprocal Enforcement of Judgments Act 1958
Reciprocal Enforcement of Judgments Act (Cap 265) [Sing]
Rules of the High Court 1980 O 23 r 1(1)

Izabella de Silva (*Ranjan Chandran* with her) (*Iza Ng Yeoh & Kit*) for the appellant/defendant.

K Goik (*Malik & Partners*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

The application

The defendant filed an application (encl 15) and sought a sum of RM40,000 or such sum as the court deems just and proper as security for

costs against the plaintiff. The facts relating to this case have been dealt with fully by me in an early related judgment (see *Salchi SPA v Ler Cheng Chye* [1999] 3 MLJ 133). On 17 November 1998, the learned deputy registrar ('DR'), having heard arguments earlier and having reserved judgment, dismissed encl 15 with costs.

The appeal

Dissatisfied with the said decision, the defendant appealed to me (encl 19). On 12 August 1999, having heard arguments, I dismissed the said appeal with costs.

Findings of the court

The basis of the appellant's claim for seeking security for costs was that the plaintiff is an Italian company, domiciled in Italy. This is not in dispute. The question of security for costs has been well and truly canvassed in the 1 Supreme Court Practice 1997 para 23/1–3/2 which reads:

> Rule 1(1) provides that the court may order security for costs 'if, having regard to all the circumstances of the case, the court thinks it just to do so'. These words have the effect of conferring upon the court a real discretion, and indeed the court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.

And a little down the same page, it says:

> Security cannot now be ordered as of course from a foreign plaintiff, but only if the court thinks it just to order such security in the circumstances of the case.

In fact in *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310 Mohamed Dzaiddin J (as he then was) held that under O 23 r 1(1) of the Rules of the High Court 1980 security for costs cannot now be ordered as of right from a foreign plaintiff but only if the court thinks it just to order depending on the circumstances of the case. However, whilst the circumstances that the court ought to consider might vary from case to case it would be impossible to categorize such circumstances. It is here that the court exercises its discretion by weighing the circumstances emanating from each case and to consider whether the justice of the case requires the granting of such security for costs. In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 at pp 285–286, Lord Denning MR considered examples of circumstances fit for the court's consideration. He said:

> The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of

success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively — so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work.

I would include as a circumstance for the court's consideration the order made earlier by this court confirming the DR's order that the defendant pay into court the full sum of RM300,000 claimed by the plaintiff, with costs. Whilst at this stage I ought not to go into the merits of the case, I cannot help but fall back on some of the findings made in respect of this case in the earlier reported decision. Obviously, when an order is given that the defendant be given conditional leave to defend by paying the full sum into court, the court must have considered the bona fides of the plaintiff's claim and the reasonable prospect of success of the plaintiff.

Whilst I agree that the Reciprocal Enforcement of Judgments Act 1958 (as Revised — 1972) does not apply in this case since Italy does not fall into the first schedule as one of the reciprocating countries, this fact in itself should not be a ground for the court to consider granting security for costs without considering the circumstances referred to earlier. Where both countries are endeavouring to enhance bilateral trade and boost each other's economies, strictures set by this court in demanding security for costs in cases such as this will have a negative effect. In fact, in *BMI Building Material International GmbH v Roberto Building Material Pte Ltd* [1999] 2 SLR 39, the Singapore Court of Appeal held that even though its Reciprocal Enforcement of Judgments Act (Cap 265) did not apply in Germany, the onus was on the local company (the respondent/defendant in that case) to prove that it could not enforce a judgment in its favour in Germany, or that the delay on such enforcement would be so great as to constitute an exceptional circumstance. The Court of Appeal went on further to hold that the fact that Germany was not a country to which the Reciprocal Enforcement of Judgments Act (Cap 265) applied did not mean that there was no other redress available to the respondent under German law. Whilst conceding that a delay in enforcing a Singapore judgment in Germany could be expected, the court held that the respondent had not however established that such delay would be so great as to make it an exceptional circumstance. I accept, adopt and will apply this same reasoning to the case before me.

The defendant herein has not shown that he has no other remedy based on Italian law, to recover costs in Italy if the plaintiff fails in this action. Even if there was such a law available, the defendant has failed to show that any delay that might be occasioned in the process of recovering its costs through such available law, would be so prejudicial as to fall within any of the circumstances that this court ought to consider in the defendant's favour. In fact, in *Abdul Fattah Mogawan & Anor v MMC Power Sdn Bhd & Anor* [1997] 5 CLJ 1, I had held that if a foreign plaintiff's predicament and

impecuniosity had been brought about by the action of the defendant, such conduct could constitute special circumstances for the court's consideration in refusing an application for grant of security for costs.

Having considered all factors and authorities, I dismissed the defendant's appeal with costs.

Appeal dismissed with costs.

Reported by Chin En Tek